Petition

81-519

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In the Supreme Court of the United States

October Term, 1980

WALTER LEE KEETER, JR.
and
BERNARD THOMAS BRAY
Petitioners

VS

COMMONWEALTH OF VIRGINIA
Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. DID THE ENTRY BY LAW ENFORCEMENT OFFICERS ONTO PREMISES FOR WHICH A SEARCH WARRANT SUBSEQUENTLY ISSUED CONSTITUTE AN UNREASONABLE SEARCH AND SEIZURE IN VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION?

II. WHERE THE PROSECUTION FAILS TO INTRODUCE SUSPECTED MARIJUANA OR A CHEMICAL ANALYSIS THEREOF IN EVIDENCE TO SUPPORT ONE OF TWO INDICTMENTS AGAINST EACH PETITIONER CHARGING DISTRIBUTION OF MARIJUANA IN VIOLATION OF SECTION 18.2-248 OF THE CODE OF VIRGINIA (1950), AS AMENDED, CAN A RATIONAL TRIER OF FACT FIND PROOF OF GUILT BEYOND A REASONABLE DOUBT?

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OFFICAL AND UNOFFICIAL REPORTS OF VIRGINIA SUPREME COURT OPINION

Walter Lee Keeter, Jr. and Bernard Thomas Bray v. Commonwealth of Virginia, 222 Va. __, 222 V.R.R. 121 (1981)

JURISDICTION

This Court has jurisdiction to review the judgment of the Supreme Court of Virginia, entered June 12, 1981 (App. 11) pursuant to 28 U.S.C. Section 1257 (3) in that the Petitioners allege (1) a violation of their right to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, as guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution, and (2) that their convictions on two of four indictments were not established upon proof of guilt beyond a reasonable doubt which amounts to a denial of liberty without due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution states:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and sei-

> zures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the United States Constitution states, in pertinent part:

> No person shall . . . be deprived of . . . liberty . . . without due process of law . . .

The Fourteenth Amendment to the United States Constitution states, in pertinent part:

> . . .(N)o state . . . shall . . . deprive any person of . . .liberty . . .without due process of law . . .

STATUTORY PROVISION INVOLVED

Va. Code Ann. §18.2-248 (1979 Cum. Supp.) states in pertinent part:

> . . . (I)t shall be unlawful for any person to manufacture, sell, give, distribute or possess with intent to manufacture, sell, give or distribute a controlled substance.
>
> (a) Any person who violates this section with respect to a cont-

rolled substance classified in Schedule I. . . shall upon conviction be imprisoned for not less than five nor more than forty years and fined not more than Twenty-Five Thousand Dollars; ...

STATEMENT OF CASE

According to the evidence adduced at trial, the offenses of which the Petitioners were convicted occurred as follows:

On March 1, 1978, the Virginia Beach Police Department enlisted the services of Charles Watkins as a confidential informant to be utilized in an investigation of a marijuana distribution scheme operated primarily by the brother-sister team of Nancy and Andrew Roberts. Watkins was instructed to purchase marijuana from these individuals with currency provided by law enforcement agents which had been "marked" and recorded by serial number. Detectives R.W. Harris and G.O. Andrews wired Watkins with a body transmitter so that his activities could be monitored. The informant traveled to the White Heron Motel/Restaurant on Laskin Road to attend a prearranged meeting with the drug dealers. Harris stationed himself inside the lounge area for observation purposes. Detectives A.L. Hymons, R.L. Schmehl and Andrews positioned themselves in a nearby parking lot hopefuly to track one or both of the Roberts to their supplier of the contraband.

The marked currency was delivered by Watkins to Nancy Roberts who passed it to her brother. Mr. Roberts took the keys to his sister's 1973 Pinto automobile, walked outside and drove away. According to the detectives, he was dressed in jeans or Levis and a longsleeved, dark flannel shirt. Roberts traveled to 2508 Reagan Avenue with Detectives Hymons and Schmehl following in two separate, unmarked police the arrest of the Roberts taking place at the White

Heron. While he did not fear for his life and saw no one enter or leave 2508 Reagan Avenue, he did theorize that any evidence inside could be destroyed unless the premises were immediately secured.

According to the police, Roberts eventually exited carrying a clear, plastic bag of dimensions approximately 12" x 12" which contained a green-brown plantlike material which the officers suspected to be marijuana. Roberts disputes this point even though he appeared at trial to testify against the Petitioners pursuant to an agreement reacched with the prosecution. He maintains that he was wearing a blue, bulky ski jacket under which he placed the marijuana in order to hide it from view. Roberts returned to the White Heron with Schmehl following where he and his sister were arrested. Hymons continued to watch the house at 2508 Reagan Avenue.

Thereafter, Detectives Andrews and Harris relieved Hymons. Prior to their arrival, Hymons initially testified that following Roberts' departure, no one was observed near the premises. However, on the second day of the trial, when he was recalled as a witness for the Commonwealth, Hymons claimed that two unidentified white males left the area in a Ford Bronco truck, but he was unable to ascertain their point of departure. When Andrews came on the scene, he dispatched Hymons to Police Headquarters in order to secure a search warrant for the dwelling. Harris and Andrews continued to watch the house while parked in an unmarked police vehicle. During this observation period, Harris had no fear for his life, did not feel that any evidence inside the residence would be destroyed, saw no movement in the house, did not call for any assistance to surround the premises, did not try to watch all entrances, did not look inside the dwelling, saw no one enter or leave much less flee the scene, and simply assumed that a search warrant was being obtained by Hymons. At one point he was concerned about the two individuals who were driving a Ford Bronco vehicle toward the White Heron, but did not hear his partner, Detective Andrews, talking over

the police communication system regarding this possibility. Andrews testified that he saw movement in the house and actually discussed this with Harris. Further, he as worried about the fact that the two white males in the Bronco could conceivably discover the arrest of the Roberts taking place at the White Heron. While he did not fear for his life and saw no one enter or leave 2508 Reagan Avenue, he did theorize that any evidence inside could be destroyed unless the premises were immediately secured.

Consequently, he and Harris knocked at the door, were allowed entry by one of two females present, Cathy Wilson, and "froze" the house under "exigent circumstances." The detectives fully intended to take control of the premises regardless of any consent proferred by either occupant. While inside, Andrews looked in each room and closet and observed quantities of suspected marijuana. After determining that there was no one present other than the two women in the custody of Detective Harris, he telephoned Hymons at Police Headquarters and advised him of what he had seen.

Detective Hymons eventually obtained a search warrant from a magistrate before returning to 2508 Reagan Avenue. Meanwhile, Walter Lee Keeter, Jr. and Bernard Thomas Bray had been taken into custody upon their arrival at the house after Andrews and Harris gained entry, but before Hymons brought the search warrant. This de facto arrest occurred despite the fact that Keeter and Bray had driven their vehicle in a normal fashion to the home while being followed by a marked police cruiser.

The search warrant subsequently was executed at 2508 Reagan Avenue and a large quantity of marijuana and currency was discovered, including the marked money that Watkins had provided Andrew Roberts.

The Petitioners were arraigned in the Circuit Court of the City of Virginia Beach to answer two indictments each for Distributing Marijuana and

Possessing Marijuana with the Intent to Distribute in violation of Section 18.2-248 of the Code of Virginia (1950), as amended. Trial was heard simultaneously with a Motion to Suppress the Evidence on October 24, 25 and November 5, 1979, without the intervention of a jury. At the conclusion of the evidence and upon consideration of argument by counsel, the court overruled the Motion to Suppress and found the Petitioners guilty on all counts. (R.505) On April 14, 1980, the trial court reconvened, heard additional argument, considered presentence reports and sentenced each defendant to a five-year term of incarceration in the penitentiary of the Commonwealth of Virginia on both charges and ordered the sentences to run concurrently.

The Petitioners applied to the Supreme Court of Virginia for a Writ of Error specifically requesting review, inter alia, of both questions presented herein. An appeal was granted, but only as to the issue of whether or not the trial court erred in failing to determine that there were exigent circumstances which would justify the entry by law enforcement officials on premises for which a search warrant subsequently issued. (App. 12-13)

ARGUMENT

I. THE ENTRY BY LAW ENFORCEMENT PERSONNEL ONTO THE PREMISES OF 2508 REAGAN AVENUE WITHOUT A SEARCH WARRANT IN ABSENCE OF EXIGENT CIRCUMSTANCES VIOLATED THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The Fourth Amendment to the Constitution of the United States provides:

> The right of the people to be secure in their persons, houses,

papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from

> surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not a policeman or government enforcement agent.

Johnson v. United States, 333 U.S. 10, 13-14 (1948).

> The right of privacy (is) deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted . . . One cannot be true to (the) Constitutional requirement (of the Fourth Amendment) and excuse the absence of a search warrant without a showing by those who seek exemption from (this) . . . mandate that the exigencies of the situation (make) that course imperative.

McDonald v. United States, 335 U.S. 451, 455-56 (1948).

The exceptions to the warrant mandate are jealously and carefully drawn to allow for circumstances where resorting to a neutral and detached magistrate is outweighed by the dangers to society. The two exemptions are: (1) when resorting to a judicial officer would involve danger to law enforcement personnel; or (2) where there is a legitimate risk that evidence will be lost or destroyed. Arkansas v. Sanders, 99 S.Ct. 2586, 2590-91 (1979). These exceptions invariably impinge to some extent on the protective purpose of the Fourth Amendment and the burden is on those seeking the exemption to show the

need for it. Arkansas v. Sanders, 99 S.Ct. at 2591. An analysis of the facts clearly illustrates that the Commonwealth has failed in its burden.

It is undisputed that Detectives R.W. Harris and G.O. Andrews entered 2508 Reagan Avenue without having first obtained a search warrant under the guise of so called "exigent circumstances." No such warrantless entry was permissible to "freeze" the house until a search warrant could be obtained because of the nonexistence of any circumstances from which one could rationally conclude that the contents of the home would be rendered unavailable to legal process. Both officers drove to 2508 Reagan Avenue in the same automobile. Harris did not remember seeing Detective Hymons, who was conducting a surveillance of the house at the time of arrival. He did not see Walter Lee Keeter, Jr. or Bernard Thomas Bray leave the premises or approach the residence. While he was concerned that the investigation might be stymied in the event anyone learned of the White Heron Motel arrests, he never overheard a conversation between Andrews and other police personnel through radio communication which would indicate that this could possibly occur. Harris saw no movement by any one in or around the home, nor did he observe an indication of a possible escape by any suspect. He had no fear for his safety, nor would such a concern have arisen had he walked to the rear of the house. Furthermore, neither detective looked inside the home to see if anything unsuual was transpiring. In fact, Harris testified that the first time he knew the residence was even occupied was when Cathy Wilson opened the front door in response to the knock of the investigators. He fully intended to enter the house whether or not the occupants gave him permission.

Detective Andrews' testimony is contradictory to that of Detective Harris. While outside the dwelling in question, he claims to have been in radio contact with Officer Bach who was in a police cruiser following two suspects driving a Ford Bronco truck which had allegedly left the vicinity of 2508 Reagan

Avenue. Andrews claims that he was afraid that the two occupants of the vehicle would travel to the White Heron Motel and learn of the arrests that had taken place there. He did not decide to enter the residence until he and Harris saw movement inside and Officer Bach radioed and informed him that the two suspects had proceeded eastbound on Laskin Road through the First Colonial Road stoplight. This led him to conclude that a telephone call could be made to 2508 Reagan Avenue to alert individuals inside to destroy any evidence of illegal activity. According to Andrews, Harris knew all of this information and concurred in the decision that they should secure the house until Hymons returned with a search warrant. Andrews was never in fear for his life and never requested the assistance of additional police personnel to surround the residence. Thus, even though Andrews was allegedly in radio contact with Officer Bach, he decided to enter 2508 Reagan Avenue with or without consent of the occupants before Bach had an opportunity to determine whether the truck would indeed approach the White Heron Motel. Interestingly, the record is totally devoid of any evidence from which one can determine the distance between the intersection of First Colonial and Laskin Roads and the White Heron Motel.

Once inside, Andrews looked in each room and closet of the house and observed large quantities of suspected marijuana. After determining that there was no one present other than the two women in the custody of Detective Harris, Andrews telephoned Detective Hymons at Police Headquarters and advised him of what he had seen, but never reported his concern that evidence might have been destroyed had he not secured the residence. Thereafter, Hymons obtained a search warrant and returned to 2508 Reagan Avenue.

There clearly was no exceptional situation which would justify entry by law enforcement personnel onto the premises of 2508 Reagan Avenue without first obtaining a search warrant. The police officers were not responding to an emergency. United States v.

Jeffers, 342 U.S. 48, 52 (1951); McDonald v. United States, 335 U.S. at 454. The detectives were not in hot pursuit of a fleeing felon. Warden v. Hayden, 365 U.S. 294, 298-99 (1967); Chapman v. United States, 365 U.S. 610, 615 (1961); Johnson v. United States, 333 U.S. at 15. The items ultimately seized were not in the process of destruction. Schmerber v. California, 384 U.S. 757, 770-71 (1966); United States v. Jeffers, supra; McDonald v. United States, 335 U.S. at 455. No contraband was about to be removed from the jurisdiction. Chapman v. United States, supra; Johnson v. United States, supra; United States v. Jeffers, supra. The mere fact that a warning telephone call might be made to the target of a search is not a sufficient exigent circumstance to support warrantless entry onto private property. United States v. Rosselli, 506 F.2d 627 (7th Cir. 1974); Raffield v. State, 351 So.2d 945 (Fla. 1978).

If the officers in this case are excused from the Constitutional duty of presenting their evidence to a magistrate, it is difficult to think of a situation in which it should be required. See Chapman v. United States, 365 U.S. at 615-16; Johnson v. United States, 333 U.S. at 15. The police could effectively search an entire house or building for "protective purposes," view contraband and contact the preparer of the affidavit in support of a subsequently issued search warrant to advise him of their findings. This is little more than "planned plain view" prohibited by Coolidge v. New Hampshire, 403 U.S. 443 (1971). One notes that Hymons neglected to recite in the affidavit tendered in support of the search warrant the fact that Andrews informed him by telephone of the suspected marijuana observed in the so called "protective search" of the home.

The credibility factor cannot be ignored either. The testimony of Harris and Andrews is contradictory in nearly every aspect and fails to illustrate an exigency sufficient to justify an exemption from the constitutional mandate of the Fourth Amendment. There was ample time to obtain a search

warrant, there was no probability of a material change in the situation, additional police personnel could easily have been called to the scene for surveillance purposes and a short period of observation could have prevented the destruction of contraband. See Chapman v. United States, supra; United States v. Jeffers, supra; Vale v. Louisiana, 399 U.S. 30 (1970); Payton v. New York, 63 L.Ed.2d 639 (1980).

The case at bar is squarely controlled by the authorities of this Court cited above. The decision of the Virginia Supreme Court is inconsistent therewith. The Writ of Certiorari should be granted to consider the Petitioners' claim of constitutional infringement.

II. THE EVIDENCE FAILS TO ESTABLISH BEYOND A REASONABLE DOUBT THAT THE PETITIONERS ARE GUILTY OF DISTRIBUTING MARIJUANA IN VIOLATION OF §18.2-248 OF THE CODE OF VIRGINIA (1950), AS AMENDED.

When Andrew Roberts purchased what he thought was marijuana from 2508 Reagan Avenue, he negotiated exclusively with one of two female occupants, Cathy Wilson. Neither of the Petitioners were present at the residence. Ms. Wilson obtained one pound of the suspected contraband from an undisclosed location and delivered it to Roberts who placed $480.00 upon a coffee table situated on the premises. He hid the marijuana under his ski jacket, left the house, and returned to the White Heron Motel.

Supposedly, the illegal substance was confiscated upon Roberts' arrest; however no such material was ever introduced at trial and no chemical analysis was ever performed on the suspected contraband to show that it was, in fact, marijuana.

In order to convict a person of distributing

a controlled substance, one must first prove beyond a reasonable doubt that he had possession of the same.

> . . . (I)t generally is necessary to show that (the accused) was aware of the presence and character of the particular substance and was intentionally and consciously in possession of it. Physical possession giving the defendant "immediate and exclusive control" is sufficient. However, the possession need not always be exclusive. The defendant may share it with one or more. The duration of the possession is immaterial and need not always be actual possession. The defendant may be shown to have had constructive possession by establishing that the drugs involved were subject to his dominion or control.

Clodfelter v. Commonwealth, 218 Va. 619, 622 (1977).

> . . . (I)f the proof relied upon by the Commonwealth is wholly circumstantial, as it here is, then to establish guilt beyond a reasonable doubt, all necessary circumstances proved must be consistent with guilt and inconsistent with innocence. They must overcome the presumption of innocence and exclude all reasonable conclusions inconsistent with that of guilt. To accomplish that, the chain of necessary circumstances must be unbroken and the evidence as a whole must satisfy the

> guarded judgment that both the corpus delecti and the criminal agency of the accused have been proved to the exclusion of any other rational hypothesis and to a moral certainty. . .
>
> . . . (C)ircumstances of suspicion, no matter how grave or strong, are not proof of guilt sufficient to support a (judgment) of guilty. The actual commission of the crime by the accused must be shown by evidence beyond a reasonable doubt to sustain his conviction.

Clodfelter, 218 Va. at 623.

There is virtually no doubt that the appellants did not possess, much less distribute, the alleged marijuana in question. See Clodfelter v. Commonwealth, 218 Va. 619 (1977); Woodfin v. Commonwealth, 218 Va. 458 (1977); Wright v. Commonwealth, 217 Va. 669 (1977); Fogg v. Commonwealth, 216 Va. 394 (1975); Gillis v. Commonwealth, 215 Va. 298 (1974); Huvar v. Commonwealth, 212 Va. 667 (1972); Ritter v. Commonwealth, 210 Va. 732 (1970). In essence, the prosecution has failed to establish the corpus delecti in this cause.

It is an essential of due process guaranteed by the Fourteenth Amendment that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof--defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of a criminal offense. In re Winship, 397 U.S. 358 (1970). Upon the record, there was no evidence adduced at the trial of the Petitioners which could allow a rational trier of fact to find proof of guilt beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307

(1979). No greater injustice can befall an accused charged with a crime than to be convicted upon evidence clearly failing to reach the required standard of proof. The decision of the Virginia Supreme Court is contrary to the authorities cited above and review of this issue is in order.

CONCLUSION

The Petitioners respectfully request that this Court grant them a Writ of Certiorari to the Supreme Court of Virginia to review the claims of error set forth herein.

WALTER LEE KEETER, JR.
and BERNARD THOMAS BRAY

By/s/ John W. Drescher
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MAILING CERTIFICATE

I, John W. Drescher, a member of the Bar of this Court, make oath that on or before the 10th day of September, 1981, I caused this Petition for a Writ of Certiorari to be deposited in a United States Post Office or mailbox with first class postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States pursuant to Rule 28.2. I further make oath that I have caused 3 copies of this Petition for a Writ of Certiorari to be sent to Richard B. Smith, Assistant Attorney General for the Commonwealth of Virginia, 830 East Main Street,

Richmond, Virginia 23219, depositing the same in the United States Post Office or mailbox, with first class postage prepaid.

/s/ John W. Drescher

STATE OF VIRGINIA
CITY OF VIRGINIA BEACH, to-wit:

Subscribed and sworn to before me this 9th day of September, 1981.

/s/ Kimberly A. Thomas
Notary Public

My Commission expires:

June 11, 1982

9.6.1.C

APPENDIX

Present: All the Justices

WALTER LEE KEETER, JR.,
and BERNARD THOMAS BRAY

OPINION BY JUSTICE GEORGE M. COCHRAN

v. Record No. 801078 June 12, 1981

COMMONWEALTH OF VIRGINIA

FROM THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH
Henry L. Lam, Judge

The trial court, sitting without a jury, convicted Walter Lee Keeter, Jr., and Bernard Thomas Bray of possessing marijuana with the intent to distribute and of distributing marijuana in violation of Code §18.2-248, and sentenced them to serve five years in the penitentiary on each charge, the sentences to run concurrently. We granted an appeal limited to the question whether the court erred in failing to determine that there were no exigent circumstances to justify the warrantless entry by police officers into the dwelling for which a search warrant was subsequently issued.

Prior to trial, the defendants filed motions to suppress all evidence seized pursuant to the search warrant issued on March 1, 1979. At trial, evidence was heard on the motions to suppress and on the offenses charged in the indictments to which the defendants had entered not guilty pleas. At the conclusion of the evidence, the trial court overruled the motions to suppress and found Keeter and Bray guilty as charged.

On March 1, 1979, a police informant, Charles Watkins, who worked at the White Heron Motel on Laskin Road in Virginia Beach, was provided $500 in marked currency to make a "controlled purchase" of marijuana.

A transmitter was attached to Watkins's body so that the police could monitor the transaction. At the White Heron, Watkins paid $480 of the marked money to Nancy Roberts, who then asked her brother, Andrew, to get the marijuana. Roberts drove away in a Ford Pinto bearing license plates NAN-437, followed by Detectives A.L. Hymons and R.L. Schmehl in two separate unmarked cars, and proceeded to a residence at 2508 Reagan Avenue. Roberts entered the residence and soon reappeared carrying a clear plastic bag, one foot by one foot in size, containing a greenish-brown plant-like substance, and drove off. Hymons remained and kept the residence under surveillance while Schmehl followed Roberts back to the White Heron. Roberts returned the car keys to his sister, and she directed Watkins to the bag in the car. When Watkins entered the Pinto, Schmehl approached, seized the bag containing what appeared to be marijuana, and reported this information to the other police units assigned to the case. Nancy and Andrew Roberts were arrested.

During Hymons's surveillance of the residence he did not see anyone enter or leave the dwelling, but he did see a vehicle that he described as a Ford Bronco, with two white males inside, drive away from the premises. Another officer, Detective Bach, followed the Bronco.

When the "controlled purchase" of marijuana had been completed, Detectives George O. Andrews and R.W. Harris proceeded from the White Heron to relieve Hymons at 2508 Reagan Avenue. Andrews dispatched Hymons to police headquarters to obtain a search warrant for the dwelling.

Bach reported by radio to Andrews that the Bronco had turned onto Virginia Beach Boulevard, and then that it had turned onto Laskin Road. At this time Andrews saw movement inside the residence; an occupant came to the window and looked out. Without waiting for Bach to give a further report on the destination of the Bronco, Andrews and Harris decided to enter the residence because, they testified, they

were afraid, not of danger to themselves, but of destruction of evidence. They were concerned, Andrews said, that the suspects in the Bronco would continue on to the White Heron, observe the police activity still in progress there, and arrange to have the evidence in the residence destroyed before the search warrant could be served.

Andrews and Harris knocked on the front door and identified themselves as police officers to Cathy Wilson when she came to the door. Andrews informed her that a search warrant was being obtained and they were there to secure the residence "under exigent circumstances" until the warrant could be served. Upon entering, Harris remained in the living room with Wilson and a neighbor, a young woman who had nothing to do with the case, while Andrews walked through the dwelling, looked into rooms and closets, and ascertained that no one was hiding there. He neither searched for nor seized any contraband. Seeing bags of marijuana in plain view in various locations as he went through the house, Andrews telephoned Hymons at police headquarters, reported the presence of marijuana, and directed Hymons to continue in his effort to obtain the search warrant. Andrews also gave Miranda warnings to Wilson and the other woman detained in the living room.

Wilson informed Andrews that she, Keeter, and Bray resided in the house and that the two men had gone to a restaurant. Bach confirmed by radio to Andrews that he had observed the occupants of the Bronco enter a restaurant. Subsequently, Bach reported that the suspects had left the restaurant and appeared to be returning to Reagan Avenue. At Andrews's direction, Bach followed the Bronco to 2508 Reagan Avenue, parked behind that vehicle, and escorted the men, Keeter and Bray, into the residence, where they too were detained by the officers until Hymons arrived with the search warrant.

After the search warrant was served, the officers searched the premises. They found and seized

approximately 24 pounds of marijuana, three marijuana plants, a set of scales, and $15,580.00 in currency, in addition to the $480.00 of marked money used in the purchase made earlier by Watkins.

In argument before the trial court on the motion to suppress, counsel for Keeter and Bray primarily attacked the sufficiency of the affidavit supporting the search warrant but further denied that any emergency or exigent circumstances justified the warrantless entry by the officers to secure the residence at 2508 Reagan Avenue. The trial court merely overruled the motion without stating the basis for this action. Nevertheless, the motion to suppress was expressly directed to evidence seized pursuant to the search warrant rather than to evidence seized pursuant to the warrantless entry into the residence. Indeed, the record clearly shows that the seizure of evidence was made pursuant to the search warrant.

Detective Hymons prepared and as affiant executed the affidavit for the search warrant to search the premises at 2508 Reagan Avenue for "Marijuana and Marked money." The supporting facts were stated as follows:

> On March 1, 1979, this writer received information from an informant who stated that a green 1973 Pinto bearing Va. license plates number NAN-437, would be used to pick-up and deliver marijuana in this city. This informant has been advised by the subjects involved that they had access to quantities of marijuana. This vehicle was parked at the White Heron located on Laskin R. During the observation of the Pinto, a white male entered the vehicle and drove it to 2508 Reagan Ave. As the white male subject was leaving 2508 Reagan

> Ave. he was observed placing a package in the floor of the right front seat of the Pinto. This package that was placed in the Pinto, came with the white male subject from inside the dwelling at 2508 Reagan Ave. The vehicle, Pinto, and driver were apprehended upon their return to the White Heron. The search of the right front seat area of the Pinto produced the greenish-brown plant like known to this affiant as marijuana. Marked money (U.S. currency) was used to trace the movement of the marijuana by the suspects involved.

It is apparent, therefore, that the affidavit submitted to the magistrate in support of the application for the search warrant was based entirely upon the information that the marijuana delivered to the informant, Watkins, at the White Heron had been obtained by Andrew Roberts at 2508 Reagan Avenue. This information justified the magistrate's conclusion that the affiant had probable cause to believe that the marked currency and additional supplies of marijuana were at the same address. No where in the affidavit is there any reference, express or implied, to any information received by Hymons from Andrews after the warrantless entry.[1] Moreover, no items of evidence were searched for or seized until the search warrant had been served.

In United States v. Edwards, 443 F. Supp. 192 (D. Mass. 1977), after extensive investigation and surveillance, law enforcement agents observed two men remove a package containing heroin from a car parked in front of a residence. One of the suspects with

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1 Keeter and Bray conceded, both on brief and in oral argument, that Hymons was already in the process of obtaining the warrant when he received the call from Andrews.

whom an F.B.I. agent on the surveillance team was acquainted gestured toward the agent and then, accompanied by the second suspect, carried the package into the residence. Although they knew that a search warrant was being prepared, the agents made a warrantless entry into the residence, searched for persons but not evidence, restrained the occupants, and secured the premises until the search warrant was issued. The court rejected the defendants' argument that the package should be suppressed as the fruit of an illegal entry, holding that it was neither searched for nor seized until after the warrant had been issued, and that it was therefore seized pursuant to the warrant and was untainted by the alleged illegality of the entry, even though the affidavit recounted the events that occurred outside the residence.

On appeal, the action of the trial court in overruling the motion to suppress was upheld, but on the ground that the warrantless entry was justified by exigent circumstances, i.e., the reasonable aprehension that the surveillance had been discovered and the evidence would be destroyed. United States v. Edwards, 602 F.2d 458, 468-69 (1st Cir. 1979). Nevertheless, the appellate court declined to reverse the holding of the trial court that the seizure was "factually and causally independent from the initial entry." Id. at 469-470, n.12.

In the present case, we hold that the evidence in controversy was seized pursuant to the search warrant, which was in the process of being issued before the residence was entered by the officers, and that the seizure was thus independent of the warrantless entry. Therefore, even if the entry was illegal, seizure of the evidence was not tainted thereby as "fruit of the poisonous tree" under Wong Sun v. United States 371 U.S. 471 (1963). See United States v. Sor-Lokken, 557 F.2d 755 (10th Cir.), cert. denied, 434 U.S. 894 (1977); United States v.

Worthington, 544 F.2d 1275 (5th Cir.), cert. denied, 434 U.S. 817 (1977); United States v. Race, 529 F.2d 12 (1st Cir. 1976).[2]

Nevertheless, we do not base our decision solely on this ground. At least one federal court has implied that for Fourth Amendment purposes a seizure of evidence may occur at the time of a warrantless entry when the officers secure the premises and restrain the occupants, and there is inculpatory evidence in plain view of the officers. See United States v. Berrett, 513 F.2d 154 (1st Cir. 1975); United States v. Berkowitz, 429 F.2d 921 (1st Cir. 1970). Under this rationale, if the warrantless entry is unlawful the seizure would be invalid. Therefore, absent controlling guidelines established by the Supreme Court we deem it advisable to determine the validity vel non of the warrantless entry in the present case.

Warrantless searches are per se unreasonable and violative of Fourth Amendment rights, subject to a few exceptions, such as danger to the law enforcement officers or risk of loss or destruction of evidence. Arkansas v. Sanders, 442 U.S. 753, 759 (1979); see McDonald v. United States, 335 U.S. 451, 454-55 (1948). Likewise, warrantless entries into

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2 Several courts have expressed the view that if certain evidence inevitably would have been discovered by lawful means, such evidence is not to be excluded merely because initially obtained by an improper seizure or entry. Wayne v. United States, 318 F.2d 205 (D.C. Cir.), cert. denied, 375 U.S. 860 (1963); United States v. Seohnlein, 423 F.2d 1051 (4th Cir.), cert. denied, 399 U.S. 913 (1970); Lockridge v. Superior Court of Los Angeles County, 3 Cal.3d 166, 474 P.2d 683 (1970), cert. denied, 402 U.S. 910 (1971). Since the warrant here was already being prepared and would have led to the discovery of the evidence, this rule would make the evidence admissible even if the prior entry was unlawful and constituted a seizure.

residences, while per se unreasonable, may be justified under exigent circumstances, such as the risk that evidence will be lost or destroyed. See Vale v. Louisiana, 399 U.S. 30, 34-35 (1970); United States v. Edwards, supra, 602 F.2d 458, 468 (1st Cir. 1979); United States v. Picariello, 568 F.2d 222 (1st Cir. 1978); United States v. McLaughlin, 525 F.2d 517 (9th Cir. 1975); cert. denied, 427 U.S. 904 (1976); United States v. Rubin, 474 F.2d 262 (3rd Cir.), cert. denied, 414 U.S. 833 (1973).

Contrary to the contention of Keeter and Bray, Heaton v. Commonwealth, 215 Va. 137, 207 S.E.2d 829 (1974), is inapposite. In Heaton, we acknowledged the general rule that "no-knock" entries to search pursuant to search warrants are per se unreasonable, subject to exceptions under exigent circumstances. Thus, the same principles that apply to warrantless entries aply to "no-knock" entries by law enforcement officers armed with search warrants. We held in Heaton, however, that a "no-knock" entry is not justified "where the only exigent circumstance is the readily disposable nature of the contraband that is the object of the search." 215 Va. at 139, 207 S.E.2d at 831. Nevertheless, an exigent circumstance exists justifying such an entry where the law enforcement officers have probable cause to believe that it is necessary to prevent destruction of evidence. Johnson v. Commonwealth, 213 Va. 102, 189 S.E.2d 678 (1972), cert. denied, 409 U.S. 1116 (1973). In the present case, the police officers made their warrantless entry relying upon their belief that it was necessary to prevent destruction of evidence. If they had probable cause so to believe, their entry was justified.

Therefore, in each case a determination must be made whether the law enforcement officers had probable cause at the time of their warrantless entry to believe that cognizable exigent circumstances were present. The officers are not required to possess either the gift of prophecy or the infallible wisdom that comes only with hindsight. They must be judged

by their reaction to circumstances as they reasonably appeared to trained law enforcement officers to exist when the decision to enter was made.

Applying this standard, we hold that the warrantless entry in the present case was justified. Obviously, the "controlled purchase" by Watkins was carefully planned and observed in order to locate the source of supply of marijuana obtainable at the White Heron. The surveillance conducted by various police officers disclosed factual information that gave them probable cause to believe that an unknown quantity of marijuana and the $480.00 in marked currency used by Watkins was at 2508 Reagan Avenue. Andrews and Harris then relieved Hymons in surveillance at the residence, and Hymons left to carry out Andrews's instructions that he obtain a search warrant for the property.

Andrews and Harris knew that two prime suspects had left the dwelling; they did not know that anyone remained inside. Andrews received radio reports from Bach, who was following the prime suspects, that they were proceeding on Laskin Road in the direction of the White Heron, where Andrews knew that Detective Schmehl was still "effecting arrests and removing vehicles and taking care of the Robertses." When Andrews observed movement in the house and saw an occupant come to the window and look out, he became apprehensive that the surveillance would be discovered and the search frustrated. Although he and Harris were in an unmarked police car, he felt that anyone looking at the car could easily identify it. But the chief concern of both officers was that the two suspects in the Bronco would observe the police activity at the White Heron and get word back to the residence to get rid of the incriminating evidence. Acknowledging that he made a "split-second decision," Andrews said that he and Harris made their move to prevent the evidence from being destroyed.

As it turned out, the suspects stopped at a restaurant and did not go to the White Heron, but Andrews acted on what appeared at the time to be the

reasonable probability, rather than the mere suspicion, that they would continue to the scene of the marijuana transaction and thereafter resort to prompt and evasive means to protect themselves. We conclude that the officers had probable cause to believe that it was necessary to make the warrantless entry to prevent the destruction of evidence. It follows that the trial court did not err in failing to determine that there were no exigent circumstances to justify the entry.

For the reasons assigned, we will affirm the judgment of the trial court.

Affirmed.

9.6.2.C

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 12th day of June, 1981.

Walter Lee Keeter, Jr., and
Bernard Thomas Bray, Appellants,

against Record No. 801078
Circuit Court Nos. D-6278 and D-6261

Commonwealth of Virginia, Appellee.

Upon an appeal from judgments rendered by the Circuit Court of the City of Virginia Beach on the 14th day of April, 1980.

For reasons stated in writing and filed with the record, the court is of opinion that there is no error in the judgments appealed from. Accordingly, the judgments are affirmed. The appellants shall pay to the Commonwealth of Virginia Thirty Dollars ($30.00) damages and the costs expended herein.

This order shall be forthwith certified to the said circuit court.

A Copy,
Teste:
Clerk

Appellee's costs:

Attorney's fee	$ 50.00
Printing brief	100.00
Total	$150.00

Teste:
Clerk

9.6.4.C

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday the 9th day of December, 1980.

Walter Lee Keeter, Jr., and
Bernard Thomas Bray, Appellants,

against Record No. 801078
Circuit Court Nos. D-6278 and D-6261

Commonwealth of Virginia, Appellee.

From the Circuit Court of the City of Virginia Beach

Upon the petition of Walter Lee Keeter, Jr., sometimes known as Walter L. Keeter, and Bernard Thomas Bray, sometimes known as Bernard T. Bray, an appeal is awarded them from judgments rendered by the Circuit Court of the City of Virginia Beach on the 14th day of April, 1980, in prosecutions by the Commonwealth against the said petitioners for felonies.

This appeal, however, is limited to the consideration of assignment of error No. 2 which reads as follows:

2. The trial court erred in failing to determine that there were no exigent circumstances which would justify the entry by law enforcement officials onto premises for which a search warrant subsequently issued.

On further consideration whereof, it is ordered that the parts of the record to be printed or reproduced in the appendix are to be limited to those parts of the record germane to assignment of error No. 2, and the briefs to be filed shall be limited to such discussion as is relevant to the assignment of error upon which this appeal is awarded.

The petition for appeal is refused as to the remaining assignments of error.

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Teste:

Clerk

9.6.3.C